STATE OF MICHIGAN
IN THE SUPREME COURT

In re: REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2016 PA 249

Supreme Court No. 154085

BRIEF ON APPEAL
MICHIGAN HOUSE OF REPRESENTATIVES DEMOCRATIC CAUCUS

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STATEMENT OF INTEREST OF THE MICHIGAN HOUSE DEMOCRATIC CAUCUS

On July 20, 2016, by order of the Court, a call for briefs from the Attorney General addressing both sides of two questions by the ourt regarding Governor Snyder's request for an advisory opinion regarding constitutionality of Section 152b of 2016 PA 249 was issued. The call allowed for other persons or groups interested in the determination of the questions presented to move the Court for permission to file briefs amicus curiae on the issue.

Separate and distinct from other interested parties who may file amicus curiae briefs for advisory opinions, under MCR 7.308(B)(2),[1] and as asked for by the Court, the Governor, any Member of the House or Senate, and the Attorney General may file briefs in support of or in opposition to the enacted legislation.

The Michigan House Democratic Caucus (the "Caucus") is comprised of the 45 elected Democratic Members of the Michigan House of Representatives. In the interest of efficiency, the Caucus submits to the Court a brief that speaks in unison. The Caucus maintains an interest in this matter through its role as legislators, as well as its overriding role in representing the residents of the State of Michigan.

STATEMENT OF JURISDICTION

Under Section 8 of Article 3 of the Constitution of the State of Michigan, either chamber of the Legislature or the Governor may request the opinion of the Supreme Court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

[1] MCR 7.308(B)(2) *Briefing.* states in part "The governor, any member of the house or senate, and the attorney general may file briefs in support of or opposition to the enacted legislation within 28 days after the request for an advisory opinion is filed. Interested parties may file amicus curiae briefs on motion granted by the Court."

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court should exercise its discretion to grant the Governor's request to issue an advisory opinion in this matter?
2. Whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate Const 1963. Art 8, § 2?

STATEMENT OF FACTS

Overview of the Budget Process

The legislative appropriations process takes approximately half the year to complete. The budget typically starts with a presentation of a recommendation from the Governor, which the chambers of the Legislature review concurrently, eventually passing budget appropriations in each chamber which are then negotiated through the conference process and concurred in by the full Legislature. Traditionally, legislative budgets were divided into bills that corresponded to executive departments, and separate areas where the School Aid Fund was appropriated.[2] This division allowed the Legislators to vote separately for those items they approved and disapproved. In 2011, at the direction of the Republican controlled House and Senate, the budget process changed.[3] These new budgets produced what was called a rolled-up budget. All departments were rolled into an omnibus budget appropriations bill, often referred to as the "Omnibus" bill, and all School Aid Fund allocations to K-12, community colleges, and higher education, were rolled up into the omnibus appropriation for school aid, higher education, and community colleges, colloquially referred to as the "School Bus." These two budgets typically come into being from a number of other bills that are combined into two bills. The 2016/2017 fiscal year budget for the state of Michigan was created with these two rolled-up budgets.[4]

Timeline of the 2016 Budget Process

In preparation for the budget process, on January 28, 2016, House Bill 5266 (2016), State School Aid bill, was introduced by Representative Kelly (R-Saginaw Twp.) and referred to the

[2] House Fiscal Archives 1996-2012, http://www.house.michigan.gov/hfa/Archives.asp (accessed August 25, 2016)
[3] House Fiscal Omnibus Budget Bill Archives 2011-2016, http://www.house.michigan.gov/hfa/Archives/OmnibusBudgetBill_Archives.asp (accessed August 25, 2016)
[4] 2016 House Journal 59 (No. 59, July 13, 2016), 2016 Senate Journal 60 (No. 60, August 3, 2016).

House Appropriations Committee.[5] On February 2, 2016, House Bill 5291 (2016), the School Aid, Higher Education, and Community Colleges Omnibus bill was introduced by Representative Pscholka (R-Stevensville).[6] On February 16, 2016, Senate Bill 796 (2016) State School Aid bill was introduced and referred to the Senate Appropriations Committee.[7] Also on February 16, 2016, Senate Bill 801 (2016) School Aid, Higher Education, and Community Colleges Omnibus bill was introduced by Senator Hildenbrand (R-Lowell).[8] The funding for education eventually would come out of Senate Bill 801 (2016) that contained input from the other preceding bills.[9]

On February 10, 2016, Governor Snyder presented his Fiscal Year 2016/2017 budget recommendations.[10]

On March 22, 2016, the House Appropriations Subcommittee on School Aid adopted a recommendation for a substitute bill to House Bill 5266 (2016).[11] This substitute bill included a $1,000,000.00 appropriation to reimburse nonpublic schools for the costs related to activities identified in the nonpublic schools mandate report.[12] Representative Sarah Roberts (D - St. Clair Shores) offered an amendment to remove this funding. The amendment was defeated.[13] The bill was then referred to the Appropriations Committee as a whole where it was incorporated into House Bill 5291 (2016), the House version of the School Bus.[14]

[5] 2016 House Journal 8 (No. 8, January 28, 2016)
[6] 2016 House Journal 9 (No. 9, February 2, 2016)
[7] 2016 Senate Journal 15 (No. 15, February 16, 2016)
[8] 2016 Senate Journal 15 (No. 15, February 16, 2016)
[9] 2016 Senate Journal 15 (No. 15, February 16, 2016)
[10] 2016 House Journal 13 (No. 13, February 10, 2016)
[11] 2016 House Journal 29 (No. 29, March 22, 2016), Appropriations Subcommittee Minutes, March 22, 2016
[12] 2016 House Journal 29 (No. 29, March 22, 2016), Appropriations Subcommittee Minutes, March 22, 2016
[13] 2016 House Journal 29 (No. 29, March 22, 2016), Appropriations Subcommittee Minutes, March 22, 2016
[14] 2016 House Journal 29 (No. 29, March 22, 2016)

On April 13, 2016, House Bill 5291 (2016) - the House version of the "school bus"- was taken up in House Appropriations Committee. Representative Sarah Roberts offered an amendment which would remove this money and redirect it elsewhere. The amendment was not adopted.[15]

On April 20, 2016, Senate Bill 796 (2016) was recommended out of the Senate Appropriations Committee. The bill recommended $5,000,000.00 for nonpublic school mandates.[16]

On April 26, 2016, House Bill 5291 (2016) was taken up on the House floor. Representative Sarah Roberts once again offered an amendment that would remove the nonpublic school funding, but it was not adopted.[17] House Bill 5291 (2016) passed the House with a vote of 72 aye and 36 nay votes.[18]

On May 4, 2016, Senate Bill 801 (2016) passed Senate with a vote of 23 aye and 13 nay votes.[19] This bill included a $5,000,000 appropriation for nonpublic school mandates.[20]

On June 8, 2016, a House and Senate Conference Committee met to report out Senate Bill 801.[21] The Conference Committee report included $2,500,000 for nonpublic school mandates under Section 152b of the bill.[22] Later that day, Senate Bill 801 (2016) passed the Senate with 20 aye and 17 nay votes, and the bill passed the House with 74 aye and 34 nay votes.[23]

[15] 2016 House Journal 33 (No. 33, April 13, 2016), House Appropriations Committee Minutes, April 13, 2016
[16] 2016 Senate Journal 44 (No. 44, April 20, 2016), Senate Appropriations Committee Minutes, April 20, 2016
[17] 2016 House Journal 38 (No. 38, April 26, 2016)
[18] 2016 House Journal 38 (No. 38, April 26, 2016)
[19] 2016 Senate Journal 57 (No. 57, June 8, 2016)
[20] 2016 Senate Journal 57 (No. 57, June 8, 2016)
[21] 2016 Senate Journal 57 (No. 57, June 8, 2016)
[22] 2016 Senate Journal 57 (No. 57, June 8, 2016)
[23] 2016 House Journal 57 (No. 57, June 8, 2016)

Throughout the budget process Democrats attempted to remove Section 152b from the budget believing it directly conflicted with Article 8, Section 2 of the Michigan Constitution. These attempts were thwarted. Once the School Bus bill was created, the opportunity to address the issue was no longer available and legislators were required to cast a single vote over the entirety of the School Bus.

On June 27, 2016, the Governor signed Senate Bill 801 (2016) and it became Public Act 249 of 2016.[24]

On July 13, 2016, Governor Snyder issued a request under Article 3, Section 8 of the Michigan Constitution requesting the Supreme Court to provide an advisory opinion on the constitutionality of Section 152b.[25]

MCL 388.1752b states:

> (1) From the general fund money appropriated under section 11, there is allocated an amount not to exceed $2,500,000.00 for 2016-2017 to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report published by the department on November 25, 2014 and under subsection (2).
>
> (2) By January 1, 2017, the department shall publish a form containing the requirements identified in the report under subsection (1). The department shall include other requirements on the form that were enacted into law after publication of the report. The form shall be posted on the department's website in electronic form.
>
> (3) By June 15, 2017, a nonpublic school seeking reimbursement under subsection (1) of costs incurred during the 2016-2017 school year shall submit the form described in subsection (2) to the department. This section does not require a nonpublic school to submit a form described in subsection (2). A nonpublic school is not eligible for reimbursement under this section unless the nonpublic school submits the form described in subsection (2) in a timely manner.
>
> (4) By August 15, 2017, the department shall distribute funds to nonpublic schools that submit a completed form described under subsection (2) in a timely manner. The superintendent shall determine the amount of funds to be paid to each nonpublic school in an amount that does not exceed the nonpublic school's actual cost to comply with

[24] 2016 Senate Journal 60 (No. 60, August 3, 2016)
[25] Exhibit 1

requirements under subsections (1) and (2). The superintendent shall calculate a nonpublic school's actual cost in accordance with this section.

(5) If the funds allocated under this section are insufficient to fully fund payments as otherwise calculated under this section, the department shall distribute funds under this section on a prorated or other equitable basis as determined by the superintendent.

(6) The department has the authority to review the records of a nonpublic school submitting a form described in subsection (2) only for the limited purpose of verifying the nonpublic school's compliance with this section. If a nonpublic school does not allow the department to review records under this subsection for this limited purpose, the nonpublic school is not eligible for reimbursement under this section.

(7) The funds appropriated under this section are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.

(8) Funds allocated under this section are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.

(9) For purposes of this section, "actual cost" means the hourly wage for the employee or employees performing the reported task or tasks and is to be calculated in accordance with the form published by the department under subsection (2), which shall include a detailed itemization of cost. The nonpublic school shall not charge more than the hourly wage of its lowest-paid employee capable of performing the reported.

ARGUMENT

I. STANDARD OF REVIEW

The constitutionality of a statute is reviewed de novo as a question of law.[26] Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.[27] Finally, when considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation.[28]

II. THE COURT SHOULD EXERCISE ITS DISCRETION AND GRANT THE GOVERNOR'S REQUEST TO ISSUE AN ADVISORY OPINION IN THIS MATTER.

The constitutional requirements are eloquently established in the Constitution as "Either house of the legislature or the governor may request the opinion of the Supreme Court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date."[29]

A. The question asked meets the constitutionally mandatory timing requirements to be taken up by the Court.

To qualify for an advisory opinion, a request must be made in the window between enactment of a bill into law and effective date of the Act. 2016 PA 249 was signed into law (enactment) by the Governor on June 27, 2016, with an effective date of October 1, 2016. On July 13, 2016, the Governor requested an advisory opinion from the State Supreme Court on the

[26] McDougall v Schanz, 461 Mich. 15, 23, 597 N.W.2d 148 (1999).
[27] Id. at 24, 597 N.W.2d 148.
[28] Council of Organizations & Others for Ed. About Parochiaid, Inc. v Governor, 455 Mich. 557, 570, 566 N.W.2d 208 (1997).
[29] Mich. Const. 1963, Art. 3, §8

Constitutionality of Section 152b of 2016 PA 249.[30] This request for an advisory opinion fulfills the constitutionally mandated timing requirements to qualify for an advisory opinion.

B. The question of constitutionality of Section 152b of 2016 PA 249 meets the Court's requirement of particularization of the question.

The Court has also stated that in order to issue an advisory opinion the question must particularize any claims of unconstitutionality.[31] In the Governor's July 13, 2016 request, the specific question raised was: "Whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate Article 8, §2 of the Michigan Constitution of 1963, which prohibits certain types of aid to nonpublic schools."[32] This request of the Governor is specific and limited to the constitutionality of one section of law in relation to one section of the Michigan Constitution. We believe it is limited in scope and meets the criterion of particularization.

While we believe that typically it is wise for the Court to tread lightly on issues where there is no question of fact, in this instance a nonbinding advisory opinion under Article 3, § 8 of the Michigan Constitution could provide appropriate guidance to the Governor, and the Legislature about limiting future appropriation funding within the parameters of Article 8, §2. For these reasons, we believe the Court should issue an advisory opinion in this specific incidence.

III. THE COURT SHOULD DETERMINE THE APPROPRIATION TO NONPUBLIC SCHOOLS AUTHORIZED BY SECTION 152b OF 2016 PA 249 WOULD VIOLATE CONST 1963. ART 8, § 2.

[30] Exhibit 1.
[31] Advisory Opinion re Constitutionality of 1972 PA 294, 389 Mich 441, 484, 208 N.W.2d 469 (1973).
[32] Exhibit 1.

In 1970, the Legislature passed Public Act 100 - the School Aid budget bill - which included direct financial support to eligible private schools with the aid only being available for instruction in nonreligious subjects.[33] Upon an advisory review by the State Supreme Court, the Court opined the act constitutional,[34] and $22 million state School Aid dollars began flowing to nonpublic schools. The issue provided the impetus for a campaign to amend the 1963 Michigan Constitution to constitutionally prohibit state funds from being used to support education at private schools.[35] As a result of the campaign, Proposal C of 1970 was adopted with a margin of 338,098 votes out of 2.5 million cast.[36]

Upon the passage of Proposal C, language was added to Article 8, §2 of the Michigan Constitution of 1963 stating:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature, or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

Soon after the passage of Proposal C, through a series of certified questions to help clarify issues that arose through the campaigns around Proposal C, this court unambiguously concluded Chapter 2 of Public Act 100 of 1970 was unconstitutional as of the effective date of

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[33] Patrick L. Anderson, Richard D. McLellan, Joseph P. Overton, and Dr. Gary L. Wolfram, *"Parochiaid" and the 1970 Amendment,* as part of The Universal Tuition Tax Credit: A Proposal to Advance Parental Choice in Education published on Nov. 13, 1997, https://www.mackinac.org/1082.

[34] In re: Legislature's Request for An Opinion on Constitutionality of Chapter 2 of Amendatory Act No. 100 of Public Acts of 1970 (Enrolled Senate Bill No. 1082), 384 Mich. 82, 180 N.W.2d 265 (1970).

[35] Anderson, *Supra* note *4.*

[36] Robert H. Longstaff, *Public Money for Private Education: The Ghost of 1970,* Published by Public Sector Consultants October 1, 1993.

the amendment which was December 19, 1970.[37] However, the Court referenced its analysis in re The Legislatures Request for An Opinion on the Constitutionality of Chapter 2 of Amendatory Act No. 100 of Public Acts of 1970, 384 Mich 82, 180 N.W.2d 265 (1970), where it refuted the idea of a "strict, no benefits, primary or incidental rule" in relation to any incidental benefits a religious place of worship might receive under parochiaid. At the time of that advisory opinion there was no state constitutional ban on parochiaid.[38] In Traverse City School Dist. v Attorney General, 384 Mich 390, 185 N.W.2d 9 (1970), where there was a type of constitutional ban, the issue was whether that ban was all encompassing or not. The Court in finding support for its refusal to adopt "a strict, no benefits, primary or incidental rule" commented:

> Everyone agreed the proposed amendment was designed to halt parochiaid and would have that effect if adopted. What was unclear was the impact the amendment would have on other forms of state aid to private schools. … As far as the voter was concerned, the result of all the pre-election talk and action concerning Proposal C was simply this – Proposal C was an anti-parochiaid amendment –no public monies to run parochial schools –and beyond that all else was utter and complete confusion. On November 3, 1970, the proposal was adopted by the electorate by a vote of: Yes – 1,416,800; No -- 1,078,705. As far as parochiaid was concerned, the voters rejected it. [39]

When issues surrounding Proposal C were litigated in 1970, the court made a clear determination that, barring one provision, Proposal C's language raised no question of constitutionality.[40]

A. The appropriation in question does not pay for services "incidental" to a private school's establishment and existence, but instead pays for services that are "primary" to their existence.

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[37] Traverse City School Dist. v Attorney General, 384 Mich 390, 185 N.W.2d 9 (1970) at 406-408.

[38] However, under MCL 388.557, as part of the Private, Denominational and Parochial Schools Act, 1921 PA 302, which states "nothing in this act contained shall be construed so as to permit any parochial, denominational, or private school to participate in the distribution of the primary school fund" the state had a long history of refusal to fund private schools.

[39] Traverse City School Dist. v Attorney General supra at footnote 2.

[40] Traverse City School Dist. v Attorney General, 384 Mich 390, 185 N.W.2d 9 (1970).

In determining the contours of constitutional use of funds, the court determined Proposal C had no prohibitory impact upon shared time instruction when the shared time programing provides only incidental aid to nonpublic schools.[41] An augmentation on primary versus incidental aid was discussed in re: Advisory Opinion re Constitutionality of 1974 PA 242, 394 Mich 41, 228 N.W.2d 772 (1975), when Justice Swainson, in support of not adopting "a strict, no benefits, primary or incidental rule" stated, "Since Proposal C speaks broadly in terms of the support and maintenance of all private schools, I think it is a proper interpretation of the Traverse City School Dist. v Attorney General rule to state that Proposal C forbids aid that is a 'primary' element of the support and maintenance of a private school but permits aid that is only 'incidental' to the private schools support and maintenance."[42] He further clarified this interpretation, writing:

> In my opinion the Court reached correct conclusions in the Traverse City School District case because the service examined therein were properly classified as 'incidental' to a private school's establishment and existence. Such programs as shared time and auxiliary services to be sure, do help a private school compete in today's harsh economic climate; but, they are not primary elements necessary for the school's survival as an educational institution. These incidental services are useful only to an otherwise viable school and are not the type of services that flout the intent of the electorate expressed through Proposal C.[43]

Although not binding, Justice Swainson's opinion is useful to help delve into the true purpose of this funding under Section 152b. Subsections (1) and (2) of the statute state the funds are to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report published in 2014 and any other requirements enacted into law after the publication of said report.[44] The nonpublic school mandate report was required by legislation in

[41] Id at 416.
[42] re: Advisory Opinion re Constitutionality of 1974 PA 242, 394 Mich 41, 228 N.W.2d 772 (1975) at footnote 2
[43] Id at 48-49.
[44] MCL 388.1752b

the 2014 Omnibus Budget Bill[45] under Article 6, Part 2, section 236, which directed the Department of Education to compile a report that identifies all mandates required of nonpublic schools including but not limited to mandates on student health, student or building safety, accountability, and educational requirements.[46] As indicated in the report itself, not all of the mandates listed were relevant based on the nonpublic school setting, but apply only because a school, as an institution, has to comply with the laws regarding employment practices, environmental regulation, building codes, etc., just as any other institution or place of business would.[47]

In this incidence, the entire basis of providing funding is for reimbursement to private schools for activities which the state requires of them in order to be a school. Several of the services addressed, including but not limited to; provision of student records,[48] the requirement for provision of attendance records,[49] and compliance with the Private, Denominational and Parochial Schools Act,[50] are academic in nature and mandatory for schools to comply with to exist as an educational institution. Several other services, including, but not limited to; the Food Law,[51] the Child Protection Law,[52] and the Construction of School Buildings Act,[53] are non-

[45] 2014 PA 252

[46] Sec. 236. From the funds appropriated in part 1, the department shall compile a report that identifies the mandates required of nonpublic schools. In compiling the report, the department may consult with relevant statewide education associations in Michigan. The report compiled by the department shall indicate the type of mandate, including, but not limited to, student health, student or building safety, accountability, and educational requirements, and shall indicate whether a school has to report on the specified mandates. The report required under this section shall be completed by April 1, 2015 and transmitted to the state budget director, the house and senate appropriations subcommittees responsible for the department of education, and the senate and house fiscal agencies not later than April 15, 2015.

[47] Public Act 252 of 2014 NONPUBLIC MANDATE REPORT, November 25, 2014 (revised) Michigan Department of Education

[48] MCL 380.1135

[49] MCL 380.1578

[50] 1921 PA 302

[51] MCL 289.1101 *et seq.*

[52] MCL 722.621 *et seq.*

[53] MCL 388.851 *et seq.*

academic in nature, but are mandatory for schools to comply with to exist as an institution in general. "The word school means little more than an institution with educational purposes and activities." School District No. 3, Norton Township, Muskegon County v Michigan Municipal Finance Commission, 339 Mich. 96, 62 N.W.2d 445 (1954)[54]

By comparison, where the Court has found that shared time programing provided incidental benefit to private schools through the provision of those services, it has also recognized the State does not mandate that a public school provide them.[55]

Reimbursement costs should not be considered to be an incidental benefit because the reimbursement to nonpublic schools for costs incurred in complying with state mandates placed upon these schools predicates their existence both as an educational institution and an institution in general. Any funds received through Section 152b of 2016 PA 249 should be considered to be a primary benefit, and therefore aid, in violation of Article 8, §2, of the Michigan Constitution ban on aid to nonpublic schools.

B. While Article 8, Section 2, of the Michigan Constitution allows for public funds to be used for providing auxiliary services to nonpublic school pupils, Section 152b of PA 249 of 2016 does not meet the requirements laid out to qualify as auxiliary services.

Traverse City School Dist. v Attorney General held that the provision of auxiliary services to nonpublic school students was constitutional under Proposal C.[56] In its discussion of the issue, the Court specifically recognized what it considered to be the best definition of auxiliary services as the statute at the time, which read:

> Whenever the board of education of a school district provides any of the auxiliary services specified in this section to any of its resident children in attendance in the elementary and high school grades, it shall provide the same auxiliary services on an

[54] Citing Bastendorf v Arndt, 290 Mich. 423, 287 N.W. 579 (1939).
[55] Snyder v Charlotte Public School District, Eaton County, 421 Mich 517, 365 N.W.2d 151 (1984) quoting Traverse City v Attorney General supra at 533.
[56] Traverse City School Dist. v Attorney General, at 417.

> equal basis to school children in attendance in the elementary and high school grades at nonpublic schools. The board of education may use state school aid funds of the district to pay for such auxiliary services. Such auxiliary services shall include health and nursing services and examinations; street crossing guards services; national defense education act testing services; speech correction services; visiting teacher services for delinquent and disturbed children; school diagnostician services for all mentally handicapped children; teacher counsellor services for physically handicapped children; teacher consultant services for mentally handicapped or emotionally disturbed children; remedial reading; and such other services as may be determined by the legislature. Such auxiliary services shall be provided in accordance with rules and regulations promulgated by the state board of education.[57]

In discussing the definition, the Court acknowledged that auxiliary services are functionally health and safety measures,[58] but made special note of the clause "and such other services as may be determined by the legislature." Specifically, the Court stated:

> Of course, what this Court holds regarding auxiliary services is limited to those services enumerated in the Auxiliary Services Act. The clause in the Act which states that auxiliary services shall include 'such other services as may be determined by the legislature' does not give the legislature a blank check to make any service a health and safety measure outside the reach of Proposal C simply by calling it an auxiliary service.[59]

Subsequent to the decision in Traverse City School District, Michigan replaced its school code of 1955 with the current school code. MCL 340.662 became MCL 380.1296, stating:

> The board of a school district that provides auxiliary services specified in this section to its resident pupils in the elementary and secondary grades shall provide the same auxiliary services on an equal basis to pupils in the elementary and secondary grades at nonpublic schools. The board may use state school aid to pay for the auxiliary services. The auxiliary services shall include health and nursing services and examinations; street crossing guards services; national defense education act testing services; teacher of speech and language services; school social work services; school psychological services; teacher consultant services for students with a disability and other ancillary services for students with a disability; remedial reading; and other services determined by the legislature. Auxiliary services shall be provided under rules promulgated by the superintendent of public instruction.[60]

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[57] M.C.L.A. Sec. 340.622 *repealed 1976, Act 451, Imd. Eff. Jan. 13, 1977.*

[58] Traverse City School Dist. v Attorney General supra at 419.

[59] Id at 420.

[60] MCL 380.1296

Although terminology may have changed, substantively the language and content in the law remains the same. In Michigan, the provisions of a law or statute which is re-enacted so far as they are the same as those of prior laws, shall be construed as a continuation of such laws.[61] Section 152b requires the State to provide reimbursement for costs incurred by nonpublic schools in complying with mandates identified in the Public Act 252 of 2014 NONPUBLIC MANDATE REPORT, and any other requirements enacted subsequent to the report. The report itself already includes many requirements that do not qualify as auxiliary services, and the carte blanche authority under subsection 2 of Section 152b requiring the department to provide funds for other requirements enacted into law after the report make it clear that the funding under Section 152b cannot be considered auxiliary funding.

C. Section 152b as a direct payment to reimburse nonpublic schools.

In Traverse City School District, the Court did not address a funding scheme established under Section 152b. It did, however, provide guidance to the issue when it stated three differences between the unconstitutional parochiaid and the constitutionally permissible shared time programing. The differences are: under parochiaid the public funds are paid to a private agency whereas under shared time they are paid to a public agency; parochiaid permits a private school to choose, and to control a lay teacher whereas under shared time the public school district chooses and controls the teacher; and parochiaid permits a private school to choose the subjects to be taught, so long as they were secular, whereas under a shared time program the

[61] MCL 8.3u

public school system prescribes the public school subjects.[62] The Court clarifies the main issue in these differences, stating, "These differences in control are legally significant."[63]

Section 152b of PA 249 of 2016 directly appropriates funds for the specific purpose of being allocated to nonpublic schools on a reimbursement schedule to repay the nonpublic school for complying with state requirements. The paperwork to be filed for this reimbursement is largely administrative in purpose and the Department of Education is mandated by "shall" with no discretion on whether to issue reimbursement to the filing nonpublic schools.[64] In essence, nonpublic schools are able to control what reimbursements they request and the Department has no discretion in approving or denying the requests. Because the control is located with the nonpublic school, the funding under Section 152b functions as parochiaid in violation of Art. 8, §2 of the Michigan Constitution.

D. The Legislature's statements in Section 7 and 8 do not overcome the Court's powers of judicial interpretation on constitutional issues.

Under most circumstances, courts give deference to the law making authority of the Legislature often stating, "arguments that a statute is unwise or results in bad policy should be addressed to the Legislature"[65], and "the well-established rule that a statute is presumed to be constitutional unless its unconstitutionality is clearly apparent."[66] However, Sections 7 and 8 of MCL 388.1752b function under a false cloak of legislative interpretation. In Richardson v Hare, 381 Mich 304, 160 N.W.2d 883 (1986), the Court recognized it is not bound by the legislative

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[62] Traverse City School Dist. v Attorney General at 413.
[63] Id at 414.

[64] See MCL 388.1752b(4).
[65] People v Kirby, 440 Mich. 485, 487 N.W.2d 404
[66] McDougall v Schanz, Supra 1

interpretation of constitutional provisions, but must determine independently the meaning of constitutional terms the court stated. In Richardson, the Court struck down a public act which "endeavored to place an interpretation having the effect of law upon the words "civil appointment' as used in the Michigan Constitution of 1963, Article IV, s. 19."[67] Specifically, the court struck down legislation which attempted to insert as a definition:

> The term "election", as used in this act, shall mean and be held to include any election and primary election, at which the electors of the state or of any subdivision thereof choose or nominate by ballot public officials or decide any public question lawfully submitted to them. *The term "election" is not synonymous with the term "civil appointment" as such term appears in section 9 of article 4 of the state constitution.* (emphasis added).[68]

In deciding the case, the Court addressed the issue of the legislature attempting to define an action into constitutionality stating, "Interpretation of the State Constitution is the exclusive function of the judicial branch. Construction of the Constitution is the province of the courts and this courts construction of a State constitutional provision is binding on all departments of government, including the legislature."[69] The Court went further to distinguish the efforts of the Legislature in Public Act 152 of 1968 from other situations where judicial deference to the Legislature would be appropriate, stating:

> Plaintiff cites Smith v. Auditor General, 165 Mich. 140, 130 N.W. 557, which held that in construing statutory provisions the practical construction which the legislature has during a long period of time adopted with reference to their meaning is entitled to weight; and Thayer v. Michigan Department of Agriculture, 323 Mich. 403, 35 N.W.2d 360, which reiterated the oft stated presumption of constitutionality of an act of the legislature; and Sullivan v. Michigan State Board of Dentistry, 268 Mich. 427, 256 N.W. 471, which held that a statute may be construed in either of two ways, one of which is consistent with constitutionality while the other is not, the former will be presumed to be the legislative intent. *These lend no support for the proposition that it is competent for the legislature to*

[67] Richardson v Hare, 381 Mich. 304, 311, 160 N.W.2d 883 (1968) at 310
[68] 1968 PA 152
[69] Richardson supra at 309.

> *take a term or language in the Constitution, interpret it and make that legislative interpretation the law*. (emphasis added).[70]

The court continued on, stating further:

> Equally inapt is plaintiff's citation of People ex rel. Twitchell v. Blodgett, 13 Mich. 127, for the claimed proposition that an act of the legislature not prohibited by express words of the Constitution or by necessary implication cannot be declared unconstitutional by the Court; and also Bowerman v. Sheehan, 242 Mich. 95, 219 N.W. 69, 61 A.L.R. 859, to the effect that under a State Constitution the legislature has all powers not thereby denied to it. *The point is that what the legislature attempted to accomplish by the Act 152 interpretation of the Constitution is expressly prohibited by the Article III, s 2, separation of powers and the Article VI, s 1, vesting of judicial powers exclusively in the court.* (Emphasis added).[71]

The Court ruled because the Act was in essence working to define something that was unconstitutional into the realm of constitutionality, that the Act itself was "beyond the power of the legislature to enact and [was] hence, unconstitutional."[72]

Richardson is a beacon signal in the muddied waters of deference to the Legislature, standing as a bulwark against Michigan's Constitution being whittled away under a false guise of legislative intent. In this instance, the Legislature has included in Section 152b language directing, not an intention of the Legislature, but instead how the funds in question are to be viewed by outside parties, including, in the event of a constitutional challenge. This is clearly evident in subsection 7 of Section 152b where the legislature attempts to fix or establish boundaries or limits to how the appropriation should be perceived by others, stating the funds "are to be considered incidental to the operation of a nonpublic school".[73] Like the unconstitutional Public Act 152 of 1968, here the Legislature attempts to define away the

[70] Ibid.
[71] Id at 310.
[72] Ibid.
[73] Section 152b(7) of 2016 PA 249, MCL 388.1752b(7)

problem saying even through the program is a direct appropriation to nonpublic schools, the funds are to be considered "incidental" by others in an effort to align the categorical funding within the court defined parameters of constitutionally permissible funding to nonpublic schools.

Additionally, the language of the Act attempts to deter constitutional scrutiny by stating in subsection 8 of Section 152b that the funds under this section "are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to nonpublic school students, or support the employment of any person at any location where instruction is offered to a nonpublic student."[74] This language directly conflicts with the next subsection which the Legislature clarifies the intent of the categorical which is to reimburse nonpublic schools for their "actual costs" and defines "actual cost" to mean "the hourly wage for the employee or employees performing the reported task or tasks and is to be calculated in accordance with the form published by the department."[75]

CONCLUSION

We believe that issuing an advisory opinion should be done rarely, with care, and only on a solemn occasion. In the current instance, advice from the Court is merited and necessary.

Because subsections 7 and 8 of Section 152b of 2016 PA 249 impermissibly legislate something into to law that is clearly unconstitutional, the Court should provide clear guidance as to where legislative deference ends and encroachment into the judicial powers begins.[76]

[74] Section 152b(8) of 2016 PA 249, MCL 388.1752b(8)
[75] Section 152b(9) of 2016 PA 249, MCL 388. 1752(9)
[76] Mich Const. Art. 3 §2

The Court should provide through its advisory capacity under Article 3, Section 8 of the Constitution, that Section 152b of 2016 PA 249 in its entirety is in direct violation of Article 8, section 2, which prohibits funding for nonpublic schools.

RELIEF REQUESTED

For the reasons set forth herein, the Michigan House of Representatives Democratic Caucus requests this Court issue an advisory opinion determining MCL 388.1752b to be unconstitutional and of no effect to 1979 PA 74, as amended.

Respectfully submitted,

DATE: August 26, 2016 By_____
/s/ Patricia Tremblay-Pluta (P74303)

DATE: August 26, 2016 By_____
/s/ Daniel Feinberg (P69956)